

**A Thomas Thomas @ Mohan a/l K Thomas v Tenaga Nasional
Bhd**

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
W-04(IM)-8-01 OF 2014
ZAWAWI SALLEH, VERNON ONG AND ABDUL RAHMAN SEBLI
JJCA
5 JANUARY 2017

C *Public Utilities — Electricity — Charges for electricity — Discovery of meter
tampering at premises that resulted in loss of revenue by Tenaga Nasional Bhd
(‘TNB’) — Claim for loss of revenue — Whether appellant responsible for any
D electricity charges incurred by his tenant or TNB’s loss of revenue — Whether
appellant was consumer of electricity — Whether consumption of electricity in
premises was sole responsibility of appellant under agreement for supply of electricity
with TNB — Whether appellant’s responsibility to ensure that meter at premises
was not damaged or tampered with — Whether appellate intervention necessary*

E Tenaga Nasional Bhd (‘TNB’) discovered evidence of meter tampering at the
premises known as No 34, Changkat Bukit Bintang, Kuala Lumpur (‘the
premises’). The calculation of TNB’s loss of revenue as a result of the tampering
was RM77,318.67. At all material times, Thomas Thomas @ Mohan a/l K
F Thomas (‘the appellant’) was the owner of the premises and TNB’s registered
consumer for the premises. Consequently, TNB issued two notices of demand
to the appellant to recover the loss of revenue. When the appellant refused to
pay, TNB commenced proceedings in the sessions court. It was the appellant’s
contention that although he was the registered owner of the premises, he had
G not tampered with the meter and he was not the consumer of the electricity
because at the material time the premises were tenanted. The appellant
therefore argued that he was not responsible for any electricity charges incurred
by his tenant during the tenancy period or the RM77,318.67 claimed by TNB.
TNB responded that there was no requirement under the Electricity Supply
H Act 1990 (‘the Act’) that TNB had to prove that it was the appellant as the
registered consumer who damaged or tampered with the meter before it could
succeed in its claim against the consumer under s 38(3)–(5) of the Act. The
sessions court found that TNB’s claim against the appellant had been proved.
On appeal the High Court also agreed that the appellant was liable to TNB.
I This was the appellant’s appeal against the decision of the High Court that the
appellant was liable to the TNB in its claim for the loss of revenue under
s 38(3)–(5) of the Act.

Held, dismissing the appeal with costs:

- (1) Being a commercial contract, it would not be commercially sensible to construe the contract between the appellant and TNB as requiring TNB to first prove that the damage or tampering was done by the appellant before it could succeed in its claim. Such proof would only be required if the appellant had been charged with any of the offences relating to meter tampering specified in s 37 of the Act. Further, in an action by TNB to recover loss of revenue resulting from meter tampering, the appellant as a registered consumer could not avail himself of the defence that he had not tampered with the meter and that he was not the consumer of the electricity at the material time, for the simple reason that it will result in unjust enrichment to the consumer. Although the premises were rented to and occupied by a third party, the appellant could not run away from the fact that the agreement for the supply of electricity to the premises was between him and TNB and did not involve any third party. Therefore, as far as consumption of electricity in the premises was concerned, it was the appellant's sole responsibility, being the 'consumer' under the agreement, to pay all outstanding charges due to TNB (see paras 11–20). A
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- (2) As TNB's registered consumer, it was the appellant's responsibility to ensure that the meter at the premises was not damaged or tampered with, unless by his tenancy agreement with the tenant, the appellant had assigned such responsibility to the tenant. However, even then such agreement would not bind TNB, since TNB was not a party to the tenancy agreement. Thus, where the meter was damaged or tampered with by the tenant or the occupier with or without the appellant's permission or by anyone else during the tenancy period, the appellant should pay for the resulting loss of revenue suffered by TNB, not because he had anything to do with the tampering or damage caused to the meter but because he was bound by agreement to pay for the electricity charges. The loss of revenue under such circumstances could not fall on TNB's head (see paras 21–23). E
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- (3) The lower courts were correct in their findings of fact and in holding that TNB's claim against the appellant had been proved. It is settled law that an appellate court would be slow to interfere with such findings of fact unless it can be shown that no reasonable tribunal properly appraised of the facts and the law would have arrived at such conclusion. In the present case, there was no valid reason to interfere with the concurrent findings of the courts below (see paras 26–28). H

[Bahasa Malaysia summary]

Tenaga Nasional Bhd ('TNB') menemui bukti usikan meter di premis yang dikenali sebagai No 34, Changkat Bukit Bintang, Kuala Lumpur ('premis-premis tersebut'). Perkiraan kehilangan pendapatan TNB akibat usikan adalah RM77,318.67. Pada kesemua masa, Thomas Thomas @ Mohan I

- A a/l K Thomas ('perayu') adalah pemilik premis-premis tersebut dan pengguna berdaftar TNB untuk premis tersebut. Akibatnya, TNB mengeluarkan dua notis tuntutan kepada perayu untuk mendapatkan balik kehilangan pendapatan. Apabila perayu enggan membayar, TNB memulakan prosiding dalam mahkamah sesyen. Ia adalah hujahan perayu bahawa walaupun dia
- B adalah pemilik pendaftar premis-premis tersebut, dia tidak mengusik meter dan dia bukan pengguna elektrik tersebut kerana pada masa material premis tersebut disewakan. Perayu oleh itu berhujah bahawa dia bukan bertanggungjawab untuk apa-apa caj elektrik yang diguna oleh penyewanya semasa tempoh sewaan tersebut atau RM77,318.67 yang dituntut oleh TNB.
- C TNB menjawab bahawa tidak terdapat kehendak di bawah Akta Bekalan Elektrik 1990 ('Akta') bahawa TNB perlu membuktikan bahawa ia adalah perayu sebagai pengguna berdaftar yang merosakkan atau mengusik meter sebelum ia berjaya dalam tuntutannya terhadap pengguna tersebut di bawah s 38(3)–(5) Akta. Mahkamah sesyen mendapati bahawa tuntutan TNB
- D terhadap perayu telah dibuktikan. Atas rayuan, Mahkamah Tinggi juga bersetuju bahawa perayu bertanggungjawab kepada TNB. Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi bahawa perayu adalah bertanggungjawab kepada TNB dalam tuntutannya untuk kehilangan pendapatan di bawah s 38(3)–(5) Akta.
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Diputuskan, menolak rayuan dengan kos:

- (1) Sebagai kontrak komersial, ia tidak akan menjadi wajar secara komersial untuk mentafsirkan kontrak di antara perayu dan TNB seperti
- F mengkehendaki TNB untuk mulanya membuktikan bahawa kerosakan atau pengusikan yang dilakukan oleh perayu sebelum ia boleh berjaya dalam tuntutannya. Pembuktian sedemikian hanya akan dikehendaki jika perayu telah dituduh dengan apa-apa kesalahan berkaitan kepada pengusikan meter yang ditetapkan dalam s 37 Akta. Selanjutnya, dalam
- G tindakan oleh TNB untuk mendapatkan balik kehilangan pendapatan akibat daripada pengusikan meter, perayu sebagai pengguna berdaftar tidak dapat membela dirinya yang dia tidak mengusik meter dan dia bukan pengguna elektrik pada masa material, untuk sebab yang mudah bahawa ia akan mengakibatkan pengkayaan tak adil kepada pengguna.
- H Walaupun premis-premis tersebut disewakan kepada dan diduduki oleh pihak ketiga, perayu tidak dapat melarikan diri daripada fakta bahawa perjanjian untuk pembekalan elektrik kepada premis-premis tersebut adalah di antara dia dan TNB dan tidak melibatkan mana-mana pihak ketiga. Oleh itu, setakat berkenaan penggunaan elektrik di
- I premis-premis tersebut, ia adalah satu-satunya tanggungjawab perayu, sebagai 'consumer' di bawah perjanjian, untuk membayar kesemua caj yang belum dibayar kepada TNB (lihat perenggan 11–20).
- (2) Sebagai pengguna berdaftar TNB, adalah tanggungjawab perayu untuk memastikan bahawa meter di premis-premis tidak dirosakkan atau

diusik, kecuali perjanjian sewaan dengan penyewa, perayu telah menyerahkan tanggungjawab sedemikian kepada penyewa. Walau bagaimanapun, walaupun perjanjian sedemikian tidak akan mengikat TNB, memandangkan TNB bukan pihak kepada perjanjian penyewaan tersebut. Oleh itu, di mana meter dirosakkan atau diusik oleh penyewa atau penghuni tanpa atau dengan kebenaran perayu atau oleh sesiapa yang lain semasa tempoh penyewaan, perayu patut membayar untuk akibat kehilangan pendapatan yang dialami oleh TNB, bukan kerana dia tidak terlibat langsung dengan usikan atau kerosakan kepada meter tetapi kerana dia adalah terikat dengan perjanjian untuk membayar bagi caj elektrik. Kehilangan pendapatan di bawah keadaan sedemikian tidak boleh dikenakan ke atas TNB (lihat perenggan 21–23).

- (3) Mahkamah rendah adalah betul dalam dapatan fakta dan dalam memutuskan bahawa tuntutan TNB terhadap perayu telah dibuktikan. Ia adalah undang-undang yang ditetapkan bahawa mahkamah rayuan akan menjadi perlahan untuk campur tangan dengan dapatan fakta sedemikian kecuali ia boleh ditunjuk bahawa tiada tribunal munasabah yang menilai secara betul fakta dan undang-undang yang akan mencapai pada kesimpulan tersebut. Dalam kes ini, tidak terdapat alasan yang sah untuk campur tangan dengan dapatan semasa mahkamah bawahan (lihat perenggan 26–28).]

Notes

For cases on charges for electricity, see 10(2) *Mallal's Digest* (2017 Reissue) paras 2396–2408.

Cases referred to

Tenaga Nasional Bhd v Empayar Canggih Sdn Bhd (previously known as ODVD Manufacturer Sdn Bhd) [2014] 8 MLJ 280, HC (refd)

Legislation referred to

Contracts Act 1950 s 71

Electricity Supply Act 1990 ss 37, 37(1), (3), (14), 38(1), (3), (4), (5)

Appeal from: Civil Appeal No 12A-349–06 of 2012 (High Court, Kuala Lumpur)

Sitpah Selvaratnam (Michael Yap with him) (Tommy Thomas) for the appellant. Hadi Mukhlis (Shook Lin & Bok) for the respondent.

Abdul Rahman Sebli JCA:

[1] The appellant's appeal is against the decision of the Kuala Lumpur High Court affirming the decision of the sessions court which favoured the

A respondent ('TNB') in its claim against the appellant for loss of revenue as a result of meter tampering discovered at the premises known as No 34, Changkat Bukit Bintang, Kuala Lumpur ('the premises'). Having heard arguments, we reserved judgment to a date to be fixed. This then is our unanimous decision.

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[2] The following facts have been established beyond dispute:

- (a) TNB is a licensee under the Electricity Supply Act 1990 ('the ESA');
- C (b) at all material times the appellant was the owner of the premises; and
- (c) the appellant was TNB's registered consumer for the premises with account No 012364675401.

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[3] On 16 January 2008, TNB carried out an inspection on its meter at the premises and discovered that the meter had been tampered with, subsequent to which TNB lodged a police report. Meter tampering, dishonest consumption of electricity and damaging any meter are offences under s 37(1), (3) and (14) respectively of the ESA.

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[4] TNB's calculation of its loss of revenue as a result of the tampering was RM77,318.67, which covered the period between 22 September 2004–21 December 2007.

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[5] TNB then issued two notices of demand to the appellant to recover the loss of revenue. The appellant refused to pay, hence the present proceedings commenced by TNB in the sessions court.

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[6] At the trial, the focal point of the appellant's defence was that the premises had already been rented out to a third party, namely 'The Moghul House Sdn Bhd' ('Moghul House') at the time he purchased the property from one 'Straits Merchant Sdn Bhd'. He never occupied the premises and had nothing to do with the tampering of the meter. What the appellant was suggesting in effect was that he could not be made liable for something that he was not responsible for.

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[7] In his grounds of judgment, the learned High Court judge noted that the appellant had obtained judgment against Moghul House for breach of the tenancy agreement and its failure to pay for the electricity and other utility charges. The judgment sum however remained wholly unsatisfied.

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[8] It was the appellant's contention that although he was the registered owner of the premises, he was not the consumer of the electricity and that therefore he was not responsible for any electricity charges incurred by his

tenant during the tenancy period, let alone the RM77,318.67 claimed by TNB. A

[9] In this respect the facts are strikingly similar to the facts in *Tenaga Nasional Bhd v Empayar Canggih Sdn Bhd (previously known as ODVD Manufacturer Sdn Bhd)* [2014] 8 MLJ 280 where Lee Heng Cheong J decided as follows: B

I find that the defendant is liable to the plaintiff in its claim for the loss of revenue under ss 38(3)–(5) of the Act as the defendant was at all material times, the registered consumer of the plaintiff. The plaintiff's E-CIBS System (exh 1) showed that the defendant is the registered consumer and exh P24, the power supply agreement dated 4 September 1998 showed that the defendant is the 'consumer' of the electricity supplied to the defendant's premises. Further the monthly electricity bills for the electricity supplied to the defendant's premises (exh P26) are issued in the defendant's name. Thus the defendant is responsible for the same. C D

I find the defendant's contention, that at the material time, the defendant's premise was rented out to Kemboja Jaguh Sdn Bhd (refer to paras 5.3–5.8 of the defence) to be without merits as the supply of electricity to the defendant's premises is based on the power supply agreement between the plaintiff and the defendant (see exh P24) which at all material times, was valid and subsisting. Further the plaintiff's system still shows the defendant as the registered consumer and the monthly consumer bills for the defendant's premises are still issued in the name of the defendant. There was no evidence that the defendant has requested or managed to get the said Kemboja Jaguh Sdn Bhd to supply for a new meter or account with the plaintiff. Further the premise is owned by the defendant and as such the defendant is duly liable. E F

[10] We are in full agreement with the reasoning of the learned judge, which we find to be sound and in conformity with the legislative scheme of the ESA as a whole and s 38(3)–(5) in particular. The judgment was not referred to by the learned sessions court judge who tried the case nor by the learned High Court judge who heard the appeal, but in our view it is relevant and applicable to the facts and circumstances of the present case. G

[11] TNB's right to commence civil proceedings against its registered consumers for losses due to the commission of offences under s 37(1), (3) and (14) of the ESA is covered by s 38(3)–(5) of the ESA. For purposes of a claim under s 38(3)–(5), we take the view that it is not necessary for TNB to prove the identity of the person who damaged or tampered with the meter. H

[12] Section 38(3)–(5) is couched in the following language: I

(3) The licensee may require the consumer to pay him the loss of revenue due to the offence committed under section 37(1), (3) and (14) and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply.

- A** (4) A written statement by an employee of the licensee duly certified by the licensee or any person authorized by the licensee specifying —
- (a) the amount of loss of revenue or the expenses incurred by the licensee; and
 - (b) the person liable for the payment thereof,

B shall be prima facie evidence of the payment that has to be made by the consumer under subsection (3).

- (5) The amount stated in the written statement shall, within the period specified in the statement, be due and payable to the licensee and in default of payment such amount shall be recoverable by civil action in court.
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[13] In any event, it was not TNB's case that it was the appellant who tampered with the meter. Its cause of action was simply based on the fact that the tampering of the meter had caused it to lose revenue. The fact is, there is no requirement under the ESA that TNB must first prove that it was the registered consumer who damaged or tampered with the meter before it could succeed in its claim against the consumer under s 38(3)–(5). Section 38(1) speaks of 'an offence has been committed' and not 'an offence has been committed by the registered consumer'.

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[14] To require TNB to prove that the offence of tampering was committed by the registered consumer before it could succeed in its claim for loss of revenue would lead to an absolute absurdity whereby the registered consumer will escape liability if he is 'ingenious' enough to engage a third party to damage or tamper with the meter in preparation for his refusal to pay for any loss of revenue suffered by TNB resulting from the tampered or damaged meter.

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[15] Being a commercial contract, we do not think it will be commercially sensible to construe the contract between the appellant and TNB as requiring TNB to first prove that the damage or tampering was done by the appellant before it could succeed in its claim. Such proof would only be required if the appellant had been charged with any of the offences relating to meter tampering specified in s 37 of the ESA.

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H **[16]** Meter tampering, causing damage to meter or dishonest consumption of electricity are strictly criminal matters which do not and cannot affect TNB's right to recover loss of revenue by way of civil proceedings pursuant to s 38(3)–(5). No registered consumer can walk away without paying anything to TNB on the ground that the meter had been damaged or tampered with without his knowledge.

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[17] In our view, in an action by TNB to recover loss of revenue resulting from meter tampering, a registered consumer cannot avail himself of such

defence for the simple reason that it will result in unjust enrichment to the consumer. He can only be absolved of liability if he can show that no electricity was consumed at the premises during the period that the meter was tampered with.

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[18] It is not open to the appellant to say that he did not 'benefit' from the consumption of the electricity on the ground that the premises had been 'continuously occupied by an unbroken chain of tenants'. The simple truth is, the premises belonged to him and he was the registered consumer under account No 012364675401. Section 71 of the Contracts Act 1950 therefore comes into play. The provision reads:

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71 Obligation of person enjoying benefit of non-gratuitous act

Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

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[19] It is true that the premises was rented to and occupied by a third party and the appellant never occupied the premises, but the appellant cannot run away from the fact that the agreement for the supply of electricity to the premises was between him and TNB and did not involve any third party.

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[20] Therefore, as far as consumption of electricity in the premises is concerned, it was the appellant's sole responsibility, being the 'consumer' under the agreement, to pay all outstanding charges due to TNB. On the evidence as found by the learned sessions court judge and as affirmed by the learned High Court judge on appeal, electricity had in fact been consumed during the period from 22 September 2004–21 December 2007. It is irrelevant who actually consumed the electricity.

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[21] As TNB's registered consumer, it was the appellant's responsibility to ensure that the meter at the premises was not damaged or tampered with. This responsibility remains with the appellant throughout the duration of the agreement unless by his tenancy agreement with the tenant, he had assigned such responsibility to the tenant. Even then such agreement would not bind TNB, not being a party to the tenancy agreement.

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[22] Thus, where the meter was damaged or tampered with by the tenant or the occupier with or without the appellant's permission or by anyone else during the agreement period, the appellant must pay for the resulting loss of revenue suffered by TNB, not because he had anything to do with the tampering or damage caused to the meter but because he was bound by agreement to pay for the electricity charges. The loss of revenue under such

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A circumstances cannot fall on TNB's head. That will be grossly unfair to TNB.

[23] If it was the appellant's case that it was Moghul House who should bear responsibility for the outstanding electricity charges, his recourse was to bring in Moghul House as a third party and not to deflect liability away from himself and denying TNB of its rightful claim to revenue that was lost due to tampering or damage to the meter.

[24] As we mentioned in passing earlier, the learned High Court judge noted that the appellant had obtained judgment against Moghul House for breach of the tenancy agreement and for its failure to pay electricity and other utility charges. This and the fact that the judgment in favour of the appellant remained wholly unsatisfied does not relieve the appellant of his liability under the agreement to pay all outstanding charges due to TNB.

[25] The judgment debt owed by Moghul House to the appellant is totally irrelevant to the question of whether the appellant is liable to pay the outstanding charges due to TNB. That is entirely a matter for the appellant to sort out with Moghul House.

[26] All that TNB needed to do in order to sustain its claim against the appellant was to prove the following on the balance of probabilities:

- (a) TNB is a licensee under the Electricity Supply Act 1990 ('the ESA');
- (b) the appellant was TNB's registered consumer of electricity supplied to the premises;
- (c) its meter at the premises had been tampered with, making it impossible to record the correct amount of electricity supplied to the premises for the period from 22 September 2004–21 December 2007; and
- (d) the tampering caused it to suffer loss of revenue in the sum of RM77,318.67 for the period from 22 September 2004–21 December 2007.

[27] All four are essentially questions of fact and all four had been decided in favour of TNB by both the sessions court and the High Court. These findings of fact can only mean that TNB's claim against the appellant had been proved.

[28] The principle in appellate intervention on such findings of fact is well settled, that an appellate court will be slow to interfere with such findings unless it can be shown that no reasonable tribunal properly appraised of the facts and the law would have arrived at such conclusion. In the present case, we find no valid reason to interfere with the concurrent findings of the courts below.

[29] In the circumstances, the appellant's appeal is dismissed with costs.

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[30] Not all is lost though for the appellant. He can still pursue his grievance in the Federal Court in order that his rights can finally be determined by the apex court. As can be seen from learned counsel's written submissions, he is fully aware of the conflicting decisions of this court on the issue of law involved in relation to similar claims by TNB. As a matter of fact a number of such cases are pending before the Federal Court even as we deliver this judgment.

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Appeal dismissed with costs.

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Reported by Kohila Nesan

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